Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1595

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Petitioner

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PETITION FILED MARCH 20, 1981
CERTIORARI GRANTED JUNE 29, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1595

UNITED STATES OF AMERICA,

Petitioner

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX TO APPENDIX

	Page
District Court Docket Entries	1
Court of Appeals Docket Entries	8
Motion for Relief: 28 U.S.C. 2255	10
Instructions to the Jury	18
Defense Counsel's Closing Argument	41
Order Granting Petition for a Writ of Certiorari	59

The judgment order of the district court (Sept. 20, 1979), the opinion and judgment of the court of appeals (Aug. 4, 1980), and the order denying rehearing in the court of appeals and the statement of the judges dissenting from the denial of rehearing (Oct. 22, 1980) are printed as appendices to the petition for a writ of certiorari (Pet. App. 1a-29a).

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 402-63

UNITED STATES

vs.

1. **JOSEPH C. FRADY**
2. **RICHARD A. GORDON**

DATE	PROCEEDINGS
	• • • •
1963	
Apr 29	PRESENTMENT AND INDICTMENT FILED (3 Counts)
	• • • •
Oct 29	JURORS SWORN ON VOIR DIRE; JURY AND FOUR ALTERNATE JURORS SWORN:
	• • • •
	Case is RESPITED until 10:00 a.m. to-morrow;
	• • • •
Oct 30	TRIAL BEGUN; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m. to-morrow;
	• • • •
Oct 31	TRIAL RESUMED; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m., Monday, Nov. 4, 1963.
	• • • •
Nov 4	TRIAL RESUMED from 10-31-63; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m. to-morrow;
	• • • •

DATE	PROCEEDINGS

1963

Nov 5 TRIAL RESUMED; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m. to-morrow;

* * * *

Nov 6 TRIAL RESUMED; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m. to-morrow;

* * * *

Nov 7 TRIAL RESUMED; same jury and four alternate jurors; Jury charged; Alternate Jurors discharged; JURY RETIRES to consider their verdict; VERDICT: NOT GUILTY on Count 2; GUILTY as charged of FIRST DEGREE MURDER on Count 1; GUILTY as charged (Robbery) on Count 3; JURY POLLED; December 6, 1963 set as sentencing date (to give defendant time to file motions);

* * * *

Nov 14 No. 1,2: MOTION of DEFENDANT for New Trial and other relief, filed. Cert. of Serv.

* * * *

Nov 22 No. 1,2: MOTION of DEFENDANT for new trial and other relief heard, argued and DENIED; Hearing on other matters set for 1:45 P.M., Wed. Nov. 27.;

* * * *

Nov 27 No. 1,2: AFFIDAVIT of Dorrice Frances Brenner, filed. Hearing based on Affidavit of Dorrice Frances Brenner as to any impropriety in trial; MOTION for new trial and other relief reheard, reargued & DENIED;

* * * *

Dec 6 SENTENCED to imprisonment for a period of FIVE (5) YEARS to FIFTEEN (15) YEARS on Count 3; DEATH BY ELECTROCUTION on February 7, 1964 on Count 1. Defendant notified in open Court that he has TEN (10) days in which to file an appeal. Defendant REMANDED to the District of Columbia Jail; Attorney Henry L. Johnson present. Judgment & Commitment for electrocution, filed. HART, J. (Reporter Robert Henderson)

DATE	PROCEEDINGS

1963

Dec 10 No. 1,2: JUDGMENT & COMMITMENT of 12-6-63, filed. HART, J.

Dec 13 No. 1,2: ORDER STAYING JUDGMENTS in the event of an Appeal, filed. HART, J. MOTION of DEFENDANT for leave to prosecute appeal in Forma Pauperis filed and GRANTED. HART, J. NOTICE OF APPEAL, filed.

* * * *

1965

May 24 No. 1,2: MANDATE from the United States Court of Appeals AFFIRMING the Conviction of FIRST DEGREE MURDER and ROBBERY AND SETTING ASIDE the DEATH SENTENCE and REMANDING case to the District Court with directions for RESENTENCING of LIFE IMPRISONMENT on the verdict of Guilty of First Degree Murder, filed. (C.A. 18357 & 18358) OPINION, FILED.

* * * *

Jun 18 No. 1,2: Sentence of Death By Electrocution on February 7, 1964 on Count 1, imposed on Dec. 6, 1963, SET ASIDE pursuant to MANDATE from the UNITED STATES COURT of APPEALS for the District of Columbia, FILED, May 24, 1965; SENTENCED to imprisonment for HIS NATURAL LIFE on Count 1; Sentence of imprisonment for FIVE (5) YEARS to FIFTEEN (15) YEARS on Count 3, imposed on Dec. 6, 1963, to RUN CONSECUTIVELY to the LIFE SENTENCE IMPOSED ON COUNT 1; COURT RECOMMENDS IMPRISONMENT in a FEDERAL INSTITUTION. Defendant REMANDED to the District of Columbia Jail; Attorney Henry L. Johnson present. HART, J. (Reporter-G. Davis)

Jun 22 No. 1,2: JUDGMENT & COMMITMENT of 6-18-65, filed. HART, J.

DATE	PROCEEDINGS

1965

Jun 22 No. 1,2: ORDER SETTING ASIDE THE SENTENCE IMPOSED on 12-6-63 of DEATH BY ELECTROCUTION ON 2-7-64 on Count ONE, filed. (N) HART, J.

Jul 2 No. 1,2: Motion of Defendant to vacate sentence, filed. Affidavit of Defendant in support of application for leave to proceed on Appeal without prepayment of costs, filed. (Prepared by Deft.)

Jul 9 No. 1,2: MOTION to vacate sentence filed on 7-2-65 DENIED. (N) HART, J. AFFIDAVIT in support of application to proceed ON APPEAL without prepayment of costs filed on 7-2-65, DENIED as frivolous and not taken in good faith. HART, J. (N)

Jul 12 No. 1: Letter from Defendant in the nature of a motion for rediction [sic] of sentence DENIED and filed. HART, J. fiat (N)

* * * *

Jul 23 No. 1: LETTER from DEFENDANT dated 7-19-65 in the nature of Renewed Motion to reduce sentence, filed and DENIED. HART, J. (N)

Aug 2 No. 1: Letter from Defendant in the nature of motion for reduction of sentence, filed. (Prepared by Deft.)

* * * *

1966

Apr 27 No. 1: Motion of Defendant for reduction of sentence, filed 8-2-65, denied 4-27-66, filed. (N) HART, J.

* * * *

1974

Oct 21 #1: PETITION of defendant for sentence modification—"DENIED". (Fiat) (N) HART, C.J.

DATE	PROCEEDINGS

1975

Jan 3 #1: PRO SE motion to vacate sentence and set aside conviction under Title 28 USC 2255 given C.A. #74-0008; Affidavit; C/S

Jan 3 #1: ORDER denying the pro se motion of deft. to vacate and set aside sentence pursuant to Title 28 USC 2255. (N) HART, C.J.

Feb 12 #1: NOTICE of appeal from Order of 1-3-75 denying motion to vacate sentence. $5.00 paid and credited to U.S.

* * * *

May 9 #1: CERTIFIED copy of Order U.S.C.A. dated 5-8-75 granting motion for voluntary dismissal pursuant to FRAP 42(b) and dismissing the appeal.

* * * *

1976

Dec 13 #1: LETTER dated 12-10-76 from Deft. in the nature of a motion to reduce sentence. Denied; (Fiat) (N) HART, J.

1978

Jun 19 #1: MOTION, pro se, to vacate illegal sentence pursuant to Rule 35-Denied. (Fiat) (N) HART, J.

July 7 #1: NOTICE of appeal, pro se from ruling of 6-19-78; Leave to file denied; not timely. (Fiat) (N) HART, J.

Nov 9 #1: COPY of Order U.S.C.A. dated 11-8-78 denying motion for leave to proceed in forma pauperis.

1979

Mar 14 #1: COPY of Order from U.S.C.A. dated 3-14-79 directing the District Court to file nunc pro tunc 7-7-78 the Notice of Appeal of Deft. from the Order of the District Court of 6-19-78 denying the motion to correct an illegal sentence and further directing the District Court to transmit the record on Appeal as soon after the filing of the Notice of Appeal as business of Court permits. Memorandum attached.

DATE	PROCEEDINGS

1979

Mar 14 #1: NOTICE of Appeal from denial of pro se motion entered 6-19-78 nunc pro tunc 7-7-78.

Mar 14 #1: COPY of Notice of Appeal to U.S.C.A., U.S. Atty and Deft. COPY of Docket Entries to U.S.C.A. and U.S. Atty.

* * * *

July 31 #1: CERTIFIED copy of Judgment from U.S.C.A. dated 6-8-79 vacating Judgment of U.S. District Court and remanding case to the U.S. District Court for further proceedings consistent with Opinion; Opinion attached.

* * * *

Aug 3 #1: ORDER directing that the robbery sentence of five (5) to fifteen years shall run concurrently with the life sentence to which it is related, rather than consecutively. (M) HART, J.

Sept 18 #1: MOTION, pro se, to vacate, set aside or correct sentence; pursuant to Title 28 U.S.C. 2255, P/A; Affidavit.

Sept 21 #1: ORDER denying pro se motion to vacate and set aside sentence pursuant to 28 USC 2255. (N) HART, J.

Nov 13 #1: NOTICE of appeal by deft. from denial of Motion 28 USC 2255 entered Sept. 21, 1979. USCA #79-2356

* * * *

1980

Oct 17 #1: CERTIFIED copy of Judgment U.S.C.A. dated 8-4-80 reversing and remanding case to the District Court for a new trial on the 1st Count of the Indictment in accordance with the Opinion. Opinion attached.

* * * *

DATE	PROCEEDINGS

1981

Jan 22 WRIT of Habeas Corpus Ad Pros. for production of Joseph C. Frady on or before January 10, 1981, ordered and issued.

* * * *

Feb 3 #1: REMAND HEARING pursuant to Order U.S.C.A. for release of Deft. Court Orders release of Deft. on per. recog. with conditions. Rep: R. Griffey HART, J.

Feb 3 #1: ORDER for release of Deft. on per. recog. with 3rd party custody and conditions. Deft. released—release issued. (See att'd Order) HART, J.

* * * *

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 79-2356

UNITED STATES OF AMERICA

v.

JOSEPH C. FRADY, APPELLANT

DATE	FILINGS—PROCEEDINGS
(B) 11-15-79	Copy of notice of appeal and docket entries from District Court (n-2)
	* * * *
(E) 6-13-80	Argued before McGowan*, Edwards, CJ's and Friedman, US Court of Claims
(R) 8-4-80	Opinion for the Court filed by Circuit Judge Edwards
(R) 8-4-80	Judgment reversing and the case is remanded to the U.S. District Court for a new trial in accordance with the opinion of this Court filed herein this date
	* * * *
(T) 08-18-80	4-Appellee's motion to extend time to file petition for rehearing to September 17, 1980 (m-18)
	* * * *
(B) 09-09-80	Per Curiam order that appellee's motion to extend time is granted and that the time within which parties may file a petition for rehearing is extended to and including 9-17-80; McGowan and Edwards, CJ's; and Friedman, CJ, US Court of Claims
(T) 9-17-80	15-Appellee's petition for rehearing and suggestion for rehearing, en banc (m-17)
	* * * *

DATE	FILINGS—PROCEEDINGS

(H) 10-22-80 Opinion for the Court filed by Tamm, MacKinnon, Robb and Wilkey, CJ's

(H) 10-22-80 Per Curiam order, en banc, denying appellee's suggestion for rehearing, en banc; CJ Wright, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJ's

(H) 10-22-80 Per Curiam order denying appellee's petition for rehearing; McGowan and Edwards, CJ's; and Friedman, CJ, US Court of Claims

* * * *

MOTION FOR RELIEF: 28 U.S.C. 2255

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Sep. 18, 1979]

Criminal No. 402-63

UNITED STATES
vs.
JOSEPH C. FRADY

* * * *

MOTION

1. Name and location of court which entered the judgment of conviction under attack United States District Court—Washington, D.C.

2. Date of judgment of conviction Dec. 6, 1963 (original) June 18, 1965 (resentence)

3. Length of sentence Death (original) 20 years to life (resentence)

4. Nature of offense involved (all counts) First degree murder premeditated. Robbery—not challenged herein.

5. What was your plea? (Check one)
   (a) Not guilty (✓)
   (b) Guilty ( )
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

   (a) Jury (✓)
   (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (✓)

8. Did you appeal from the judgment of conviction? Yes (✓) No ( )

9. If you did appeal answer the following:

   (a) Name of court US Court of Appeals for D.C. Circuit
   (b) Result Remand for re-sentence on murder—convictions affirmed
   (c) Date of result 1965

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any Federal court? Yes (✓) No ( ) information.

11. If your answer to 10 was "yes", give the following information.

   (a) (1) Name of court US District Court—Washington, D.C.
   (2) Nature of proceeding Title 28-2255 motion to vacate
   (3) Grounds raised Pretrial publicity—inadmissible grand jury testimony
   (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (✓)
   (5) Result Denied—frivolous
   (6) Date of result Dec. 13, 1966

   (b) As to any second petition, application or motion give the same information:

(1) Name of court _____
(2) Nature of proceeding _____
_____
(3) Grounds raised _____
_____
_____
_____
_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )
(5) Result _____
(6) Date of result _____

(c) As to any third petition, application or motion give the same information:

(1) Name of court _____
_____
(2) Nature of proceeding _____
(3) Grounds raised _____
_____
_____
_____
_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )

(d) Did you appeal, to an appellate Federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ( ) No (✓)
(2) Second petition, etc. Yes ( ) No ( )
(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: In view of court's ruling frivolous felt no merit
_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Triple constitutional errors in malice instructions.

Supporting FACTS (tell your story *briefly* without citing cases or law): The courts instruction on malice contained two unconstitutional presumptions shifting the burden of persuasion to petitioner and inviting finding of required malice on less than proof beyond reasonable doubt. Additionally malice instruction mistakenly equated malice with intent. See supporting memorandum for details.

B. Ground two: Failure to instruct on essential element of first degree murder.

Supporting FACTS (tell your story *briefly* without citing cases or law): The court failed to instruct that specific intent must be proved beyond reasonable doubt. Failed to define intent. See supporting memorandum for detailed argument.

C. Ground three: Unconstitutional presumption in instruction on intent. Also instruction allowed finding of general intent sufficient.

Supporting FACTS (tell your story *briefly* without citing cases or law): The court charged an unconstitutional presumption in the intent charge inviting jury to presume essential element. Also presumption allowed finding requisite intent on mere use of weapon—general intent. See supporting memorandum.

D. Ground four: Failure to define "reclessness" [sic] as element of malice in second degree murder. Supporting FACTS (tell your story *briefly* without citing cases or law): For facts and relation to preceeding multiple constitutional errors. Please see detailed supporting memorandum. Multi-errors supra combined to infect consideration of premeditation and deliberation.

13. If any of the grounds listed in 12A, B, C and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: Combination of constitutional errors infected truth seeking function of trial and denied in due process of law. Prejudice, procedural default—waiver doctrine—retroactivity, supporting affidavit—discussed, and attached in memorandum supporting petition.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack:

Yes ( ) No (✓) not as to first degree murder.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Mr. Henry Lincoln Johnson Esq. Address unknown

(b) At arraignment and plea Same as above

(c) At trial Same as above

(d) At sentencing Same as above

(e) On appeal Same as above

(f) In any post-conviction proceeding None

(g) On appeal from any adverse ruling in a post-conviction proceeding None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes (✓) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ( ) No (✓)

(a) If so, give name and location of court which imposed sentence to be served in the future:

_____

_____

(b) And give date and length of sentence to be served in the future: _____

_____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ( ) No (✓)

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

I certify under penalty of perjury that the foregoing is true and correct.

9-6-79	/s/ Joseph C. Frady
Date	Movant's Signature
/s/ Carl Deer	02013-135
CARL DEER	Prison Number
Case Manager	
Authorized By The Act	
of July 27, 1955 To	
Administer Oaths	
(18 U.S.C. 4004).	Atlanta, Ga.
	Place of Confinement

INSTRUCTIONS TO THE JURY

[793] The Court[:] Ladies and gentlemen of the Jury, I will try to give my charge to you slowly so that you will understand it. When I get to that portion of my charge which deals with the specific crime it gets a bit complicated so I ask you to listen with particular deliberate attention to that part of the charge. Of course, you should listen to all of it with great attention but that is the complex part of it and I will read that very slowly so that you will understand it.

Now, as you know, we have reached that stage where it becomes my duty to charge you on the law of the case, which charge you are required to follow in exercising your duty to pass the facts of the case.

Before going into the principles of law which will govern you in your deliberations, I will discuss briefly the participants in the trial and the duty which each of us has.

As to counsel for the Government, you heard counsel for the Government make an opening statement wherein the counsel for the Government told you what the Government expected to prove. His statement as to what the Government expected to prove does not constitute evidence in the case.

At the close of the case, counsel for the Government and counsel for the defendants made what we refer to as summations to the Jury. They of course, did not undertake to discuss all the evidence in the case but they did discuss the evidence that constituted their recollection of that part of the evidence which they thought you should give special consideration. If your recollection disagrees with their recollection, your recollection is controlling as you are the sole judges of the issues of fact.

[794] Now, during the course of the trial there were occasions when there were colloquies between counsel and between counsel and the court in connection with which

there may have been statements of alleged fact. Quite obviously, these statements do not constitute evidence.

The function of the court is to conduct the trial of the case in an orderly and efficient manner and to rule upon questions of law during the course of the trial and, finally, to charge you with respect to the law which will control you in the determination of the issues of the fact which you have to decide.

You are not to draw any inference nor are you to be influenced with respect to the guilt or innocence of the defendants by any ruling of this court during the course of the trial. The court made rulings of law and thereby disposed of the questions that were presented either dealing with the admissibility or inadmissibility of evidence or the other questions that did arise during the course of the trial. There is nothing that the Court has said during the course of the trial or that will be said during this charge which should carry with it any suggestions as to how the court feels the case should be decided because, as I have said before, you are the sole judges of the issues of fact in this case, and for me to suggest how you should decide the case would constitute a wholly unwarranted assumption of your prerogatives in the case. In reaching your decision as to the facts in this case, you must base your judgment upon the evidence which you have heard from the witness stand, the exhibits which been received in evidence, and the inferences which reasonably deducib from that evidence, that is the testimony and the exhibits.

[795] Now, the defendants have been indicted in this case charged in two counts with first degree murder; one, the first count, being first degree murder of a nature that involves premeditation: the second count, what we felony murder; and the third count; robbery.

A little later on I will read the indictment to you but I wish to say and emphasize at this point that the fact of their indictment raises no inference of guilt. The in-

dictment is the method whereby the defendants are brought to trial and by which they are informed of the charges made against them. It is not evidence in the case.

Now, every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to a defendant throughout the trial. The burden is on the Government to prove the defendants guilty beyond a reasonable doubt and if the Government fails to sustain this burden, then you must find the defendants not guilty. [796] You may well ask, what do we mean by a reasonable doubt. It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainly and not necessarily proof to a mathimatical [sic] certainly [sic]. A reasonable doubt is one which is reasonable in view of all the evidence. There for, if, after impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied with the guilt of the defendants, or either of them, then as to such defendant you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence and giving due consideration to the presumption of innocence which attaches to the defendants, you can truthfully say that you have an abiding conviction of the defendants' guilt, or one of them, such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs, then as to such defendant you have no reasonable doubt.

Now, in determining whether the Government has established the charges against the defendants beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses who have testified before you and all the circumstances concerning which testimony has been introduced.

You are also the sole judges of the credibility of witnesses. In other words, you and you alone are to determine whether to believe any witness and the extent to which any witness should be credited. In case there is a conflict in the testimony, it is your function ro [sic] resolve the conflict and to determine where the truth lies.

[797] In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you may consider any matter that may have a bearing on the subject. For instance, you may consider the demeanor and the behavior of the witness on the witness stand, the witnesses' manner of testifying, whether the witness impressed you as a truth-telling individual, whether the witness impressed you as having an accurate memory and recollection, whether the witness had any motive for not telling the truth, whether the witness had full opportunity to observe the matters concerning which the witness has testified and whether the witness has any interest in the outcome of this case. If you find that any witness wilfully testified falsely as to any material fact concerning which the witness could not reasonably have been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness or any part of the testimony of such witness.

Now, in this case there has been evidence that one of the witnesses, namely Atkins, has a criminal record. I tell you that that was admitted in evidence solely for your consideration in passing on the credibility of Atkins. It was not received as having any bearing upon whether the defendants in this case were guilty of the charges made against them. The only reason for receiving it, the only reason it could be received, was because it might have some bearing on Atkins' credibility as a witness as you must pass upon that credibility.

[798] Now, in criminal cases, there are two types of evidence. One type is known as direct evidence and the other type of evidence is known as circumstantial evidence.

By direct evidence is meant evidence of eye witnesses who saw the act perpetrated. Circumstantial evidence consists of circumstances from which the defendants' guilt may be inferred by the jury.

One cannot say that either of the two types of evidence is more reliable or stronger than the other—An eye witness, for example, may make a mistake in identifying the person whom he saw. His memory may be inaccurate or he may intentionally fabricate a story. Circumstances too many sometimes lead to an irroneous [sic] inference. On the other hand, if the circumstantial evidence is sufficiently strong, it may be even more convincing than direct evidence because circumstances speak for themselves and irresistably lead to a definite conclusion.

To illustrate: If a defendant in a case—this has no bearing on the case at bar; it is just an illustration—if a defendant were charged with breaking and entering into a house through a window and a passerby testifies that he saw someone climb into the house through the window and identifies the defendant as the person whom he saw, this testimony would be direct evidence.

[799] On the other hand, if fingerprints were found on the window sill or sash and they were found to be the defendant's fingerprints, such evidence would be circumstantial evidence. The law permits conviction of a criminal offense on circumstantial evidence alone if the jury is satisfied beyond a reasonable doubt.

Now, in this case, we had experts in several categories testify. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should way [sic] the reason, if any given, for it. You are not bound by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if in your judgment the reasons given for it are unsound.

Now, I instruct you that no inference of guilt arises against a defendant because of his failure to testify as a witness in his own behalf.

Now, as to the specific charges in this case—and I shall take the second count up with you first for reason which shall later become apparent to you,—as I previously mentioned, the defendants are such indicated in three counts.

[800] The second count is what is commonly known as the felony murder charge. It is a first-degree murder charge. The second count charges that on or about March 13, 1963, within the District of Columbia, Joseph C. Frady and Richard A. Gordon did kill Thomas C. Bennett while perpetrating or attempting to perpetrate the crime of robbery. This second count charges each of the defendants with an offense which is commonly called felony murder. In so far as it is applicable to this case, the District of Columbia Code, Title 22, Section 2410 provides as follows:

"Whoever, being of sound memory and discretion, without purpose so to do, kills another in perpetrating or in attempting to perpetrate any robbery is guilty of murder in the first degree."

Now, the statute means this: If a person kills another in the perpetration of a robbery, or in attempting to perpetrate a robbery, the killing constitutes murder in the first degree.

Under such circumstances it does not make any difference whether the killing was committed with or without purpose so to do. Any killing, even if committed, without any purpose so to do, even if it is accidental, if it is committed in the perpetrating or attempting to perpetrate a robbery, is murder in the first degree.

[801] If two persons, acting together and jointly, are perpetrating a robbery or attempting to perpetrate a robbery and one of them in the course of the robbery and as a part of the robbery, kills another person, then both of the persons involved in the robbery or attempted robbery are guilty of murder in the first degree.

If one person is perpetrating or attempting to perpetrate a robbery and another person aids and abets him

in so doing and the first of these two persons in the course of the robbery and as a part of the robbery, kills a human being, then both the person who aided and abetted him in the robbery and the person who committed the killing are guilty of murder in the first degree.

Under the circumstances of this case, the elements of the offense of murder in the first degree, under the second count, which the Government must establish beyond a reasonable doubt, are as follows:

First, that the defendants were in the District of Columbia jointly perpetrating or attempting to perpetrate a robbery or that one of the defendants was perpetrating or attempting to perpetrate a robbery and the other defendant aided and abetted him in so doing;

Second, that in the course of so doing one of the defendants killed the deceased Thomas C. Bennett;

[802] Third, that the victim Thomas C. Bennett died as a result of a wound or wounds inflicted by one or both of the defendants;

Fourth, that the killing was within the scope of the robbery which the two defendants undertook to commit.

If each of these elements is established beyond a reasonable doubt, then both of the defendants may be found guilty of murder in the first degree under the second count but if anyone, or more of the elements which the Court has outlined to you is not proved by the Government beyond a reasonable doubt, then you must find the defendants not guilty under the second count.

Also I must tell you in connection with the second count that if you should find that the defendants did not form the intent to rob Thomas C. Bennett until after he was dead, then in that event the killing, if it was committed by the defendants or one of them with the other aiding and abetting, would not have been done in pursuance to a robbery or attempted robbery by the defendants and they would not be guilty under the second count.

Further, in this count, as I have used the term "aiding and abetting" a robbery, a little later on, under the Third

count, I will define robbery to you with particularity and you will consider this instruction which I will give you under the third count in considering count two. But I will define aiding and abetting to you at this time:

[802] [sic] The law provides that any person advising inciting or conniving in an offense or aiding and abetting the principal offender, shall be charged as a principal. That is, he is as guilty of the offense as though he himself committed it. If several persons acted jointly or in concert, each performing a part that results in the commission of the offense, all are equally guilty.

It is not essential that any specific time or made [sic] of committing the offense be advised or commanded or that it was done in a way suggested or agreed upon, nor is it necessary that there be any direct communication between the actual perpetrator and the person aiding and abetting.

So, in this case, if you find the Government has proved beyond a reasonable doubt that one of the defendants was perpetrating a robbery or attempting to perpetrate a robbery and the other defendant was aiding and abetting the first defendant in perpetrating a robbery or attempting to perpetrate a robbery and in the cause [sic] of the robbery and as a part of the robbery. Thomas C. Bennett was killed and that the intent to rob, as I shall later explain intent to you under the third count, was present prior to or at the time of the killing, then both of the defendants would be guilty of murder in the first degree under the second count.

However, if you should find that the Government has proved beyond a reasonable doubt that the defendants, or one of them, killed Bennett but that the Government has failed to proved beyond a reasonable doubt that there existed any intent to rob at the time of or prior to the killing, then the defendants would be not guilty under the second count and this would be true even though the defendants, or one of them, conceived the intent to rob the deceased after he was dead.

[803] Now, if you find the defendants guilty of murder in the first degree under the second count, then you will find the defendants not guilty under the first count. In other words, you cannot find the defendants guilty under both Counts one and Count two.

The first count also charges first-degree murder under another section of our code which does not involve a killing while perpetrating or attempting to perpetrate a robbery. If, however, you should find the defendants not guilty under the second count of the indictment, you will then go on to consider whether or not the defendants are guilty under the first count of the indictment—which charges first-degree murder involving premeditation—or under any of the lesser included offenses under the first count which are second-degree murder or manslaughter.

Now, the first count of the indictment reads as follows:

"On or about March 13, 1963, within the District of Columbia, Joseph C. Frady and Richard A. Gordon purposely and with deliberate and premeditated malice murdered Thomas C. Bennett by means of striking him with their fists and with a piece of wood."

[804] Murder in the first degree as charged in the first count, is the killing of a human being purposely and with deliberate and premeditated malice. The essential elements of murder in the first degree as applicable to the first count of this case are:

One, that the defendants in the District of Columbia inflicted a wound or wounds from which the deceased died;

Two, that the defendants had the purpose and the intent to kill the deceased, and;

Three, that the defendants acted with malice, and;

Four, that the defendants acted with premeditation and deliberation.

The first element, that the defendants inflicted a wound or wounds from which the deceased died, needs no explanation.

As to the second element, the purpose, and intent to kill, ordinarily intent canot be proved directly because there is no way of fathoming the operations of the human mind; but intent may be deduced from the circumstances and from the defendants' acts. A person is presumed to intend the natural are [sic] probable consequences of his act. If a man uses upon another an instrument of such a nature and in such a way and under such circumstances that such use would naturally and probably result in death, then you are not compelled to presume that he intended to kill from such acts but have the right to consider them in reaching a determination of his intent.

[805] As to the third element, malice, in its ordinary use in everyday life, the word malice would indicate a feeling of hatred or ill will toward another or a feeling of hastility [sic] towards an individual. In its legal sense, however, malice has a broader significance. It is a state of mind showing a heart, regardless of social duty, a mind deliberately bent on mischief, a generally deproved [sic], wicked and malicious spirit.

Malice, as the law knows it, may also be defined as the condition of mind which prompts a man to do a wrongful act wilfuly [sic], that is, no purpose, to injury of another or to do intentionally a wrongful act towards another without justification or excuse. Malice may be either express or implied. Express malice exists when one unlawfully kills another in pursuance of a wrongful or unlawful purpose without legal excuse. Implied malice is such as may be inferred from the circumstances of the killing, as, for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act, or when an act imposts [sic] danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

[806] In determining whether a wrongful act is intentionally done and is therefore done with malice afore-

thought, you should again bear in mind that every man is presumed to intend the natural and probable consequences of his own act. As I have already told you, the intent may be deduced from all the circumstances.

The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is criminal and in what degree it may be so. If in a prosecution for homicide it is shown that the accused used a deadly weapon in the commission of the homicide, the law infers or presumes from the use of such weapon in the absence of explanatory or mitigating circumstances the existence of the malice essential to culpable homicide.

Now, as to the fourth element of the first-degree murder in the first count, that the defendants acted with premeditation and deliberation, premeditation is the formation of the intent or plan to kill, the formation of a positive design to kill. It must have been considered by the defendants.

It is your duty to determine from the facts and circumstances in this case as you find them surrounding the killing whether reflection and consideration amounting to deliberation occurred. If so, even though it be of exceedingly brief duration, that is sufficient, because it is the fact of deliberation rather than the length of time it continued that is important. Although some appreciable period of time must have elapsed during which the degendants deliberated in order for this element to be established, no particular length of time is necessary for deliberation; and it does not require the lapse of days or hours or even of minutes.

[807] If you should find that the Government has proved beyond a reasonable doubt all the essential elements of first degree murder under the first count, namely, the death of the decedent from a wound or wounds inflicted by the defendants, the purpose to kill, malice and premeditation and deliberation, then you may find the defendants guilty as charged.

If you find that the Government has failed to prove all of the elements of first-degree murder under the first count, then you will consider whether the defendants have been proved guilty of the lesser-included offenses of second degree murder or manslaughter.

Second degree murder is the unlawful killing of one person by another with malice aforethought but without premeditation. Murder in the second degree may be committed either with our [sic] without any purpose or intent to kill if the killing is accomplished by malice as I have defined malice to you in detail in connection with first-degree murder. The essential elements which the Government must prove in order for you to find the defendants guilty of second degree murder are:

[808] One, that the defendants in the District of Columbia inflicted a wound or wounds from which the deceased died; that the defendants acted with malice when they wounded the deceased.

So if you find that the Government has failed to prove premeditation and deliberation but has proved the killing of Thomas C. Bennett by Joseph C. Frady and Richard A. Gordon and has proved malice aforethought, then you made [sic] find the defendants guilty of second degree murder.

Malice aforethought means malice as I have defined it to you at the time of the wounding or killing. It does not mean premeditation which is a necessary element of first-degree murder under the first count.

Now, if you should find that the Government has failed to prove malice aforethought, then you will have for consideration whether the defendants have been proved guilty of manslaughter.

Manslaughter is the unlawful killing of a human being without malice aforethought. It occurs when the homicide is committed at the time of mutual combat or when it is commited in passion or hot blood caused by adequate provocation. In otherwords, a homoicide becomes man-

slaughter where the jury finds that there was ample provocation and sudden passion and that both of these things existed at the time the fatal blow was struck.

[809] The element the Government must prove in order for you to find the defendants guilty of manslaughter are:

One, that the defendants inflicted a wound or wounds from which the deceased, died, these being inflicted in the District of Columbia.

Two, that the defendants struck the deceased in sudden passion, without malice, that the defendants' sudden passion was aroused by adequate provocation. When I say sudden passion, I mean to include rage, resentment, anger, terror and fear; so when I use the expression "sudden passion." I include all of these.

Provacation [sic], in order to bring a homicide under the offense of manslaughter, must be adequate, must be such as might naturally induce a reasonable man in anger of the moment to commit the deed. It must be such provocation would have like effect upon the mind of a reasonable or average man causing him to lose his self-control.

In addition to the great provocation, there must be passion and hot blood caused by that provocation. Mere words, however, no matter how insulting, offensive or abusive, are not adequate to induce [sic] a homicide although committed in passion, provoked, as I have explained, from murder to manslaughter.

If you find that the Government has proved all of these elements beyond a reasonable doubt, then you may find the defendants guilty of manslaughter. If, however, you find that the Government has failed to prove anyone or more of these elements, then you cannot find the defendants guilty of manslaughter and you would find them not guilty, assuming you found that the Government hadn't proved either murder in the first degree, murder in the second degree or manslaughter.

[810] Now, with regard to the charge of first-degree murder, and the lesser included offenses which I have

instructed you on under count 1, the aiding and abetting law which I have instructed you on in connection with the second count also applies to count 1.

In other words, if you find that the Government has proved beyond a reasonable doubt that the defendants were guilty, that either of the defendants was guilty of all of the elements of the crime of First-degree murder or of second degree murder or of manslaughter under my instructions and that the other defendant aided and abetted him, the other defendant, in the commission of the murder in the first degree or the second degree or manslaughter, then both defendants would be equally guilty even though only one of the defendants struck the blows which resulted in the death of Thomas C. Bennett,

Now, as to punishment: In the event that you find the defendants guilty of first-degree murder either under count 1 or count 2, it then becomes your duty to deliberate on the punishment which will be imposed. The Statute in the District of Columbia regarding punishment for first-degree murder reads as follows:

[811] "The punisment [sic] of murder in the first-degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment, or, if the jury is unable to agree as to the punishment, it shall inform the Court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment."

Under this law, if you return a verdict of guilty of murder in the first degree and do not add any recommendation to your verdict or do not say that you are unable to agree on the penalty, the defendant's sentences must be death.

Similarly if by a unanimous vote you recommend a sentence of life imprisonment, this will be the sentence the defendants would receive. If you are unable to unanimously agree on recommending life imprisonment, then you must so inform the court. It would then become the

duty of the court to impose sentence, either death or life imprisonment.

It is your duty to return a verdict in this case, and I charge you that you should deliberate fully and completely in regard to punishment. You must each reach an individual decision in this regard. This decision in this regard. This decision includes the alternatives, death by electrocution life imprisonment.

This is the law but as the law also requires that your verdict be unanimous, it further provides that when unanimity cannot be reached as to punishment, that is when all your individual views add up to less than a unanimous decision, then only in such event, the duty of fixing sentence falls upon the Court.

[812] In summary, if you find the defendants guilty of first degree murder in either the first or second count, you may return a verdict of guilty as charged which will require the imposition of the death penalty or guilty as charged with recommendation of life imprisonment; and if you are unable to agree or reach a unanimous decision as to either of these, it will then be your duty to so imform the court.

Now, as to the third count, the defendants are charged with robbery in the following language:

That on or about March 13, 1963, within the District of Columbia, Joseph C. Frady and Richard A. Gordon by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear stole and took from the person and from the immediate actual possession of Thomas C. Bennett of the value of about $88.00, consisting of the following: One wallet of the value of 1.00 and $87.00 in money.

Now, what is robbery: A robbery is defined very simple in our code:

"Whoever, by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate

actual possession of another anything of valve [sic], is guilty of robbery."

[813] In order for you to find the defendant guilty of robbery, you must find the Government has proven beyond a reasonable doubt:

One, that the defendants in the District of Columbia took something of valve [sic] from the decedent:

Two, that they took it unlawfully and with intent to convert it to their own purses [sic]:

Three, that they took it from the complainants' person or immediate actual possession;

Four, that they took it by force or violence, against resistance or by sudden or stealthy seizure or snatching or by putting the decedent in fear.

As to the first element, that the defendants took something of value, the value of the thing taken is of no consequence as long as it has some value.

As to the second element, that they took the property unlawfully and with intent to convert it to their own purposes, intent ordinarily cannot be proved directly because there again, there is no way of fathoming and scrutinizing the operation of the human mind, but intent may be deduced from circumstances, from things done and from things said; and a person is presumed to intend the natural and probable consequences of his own act.

[814] As to the third and fourth elements, that they took the wallet and money from the decedent's person or immediate actual possession, normally immediate actual possession means that the thing taken must be on the person or within the reach of the person so long as it is considered to be in such possession that if the victim knew his property was being taken such knowledge would likly [sic] result in physical violence or struggle for possession of the property.

Now, in this case as to both the element of intent as it is involved in robbery and the third element of taking from the immediate actual possession, I instruct you that

if, as a result of a homicide being committed, the perpetrators of the homicide, without having formed the intent before the homicide occurred, take something of value from the body of the deceased immediately after the homicide, this would constitute the offense of robbery in the District of Columbia.

I caution you, however, that while the taking of something of value from the body of a person who is the victim of a homicide by the defendants would constitute sufficient intent to rob under the third count, if the intent to rob was conceived only after the person was dead, that this would not be sufficient intent to rob to meet the requirements of killing another in perpetrating or attempting to perpetrate a robbery under the second count of the indictment.

[815] In other words, if the jury should find that the defendant took something of value from the body of the deceased with the intent to convert the same to their own use but that the intent to take the property was formed only after Bennett was killed, this would be sufficient intent to satisfy the requirement of Count 3 charging robbery but in order to satisfy the requirement of intent to rob in count 2 of the indictment charging felony murder, the intent to rob must have been present prior to or at the time of the killing.

Now, I have previously mentioned the law relative to aiding and abetting in connection with counts 1 and 2, and I instruct you that the same law applies with regard to count 3 and I shall not repeat this phase of the law to you again. If in this case the Government has proved beyond a reasonable doubt as to count 3, all of the elements of robbery, as I have outlined them to you as to one of the defendants and you find that the other defendant aided or abetted the principal robbery offender, then the one so aiding and abetting would be equally guilty of robbery.

Now, if the jury finds that the Government has proved beyond a reasonable doubt that a defendant had exclusive

possession of stolen property shortly after the commission of a robbery, the jury in its diseretion may infer that the possessor is involved in the robbery and the unexplained possession of recently stolen property may itself warrant a verdict of guilty of robbery.

[816] I want to make it clear, however, that the jury does not have to infer guilt from the circumstances of unexplained possession of recently stolen property but they may infer guilt from that circumstance if they see fit to do so and deem it wise under that circumstance and all the other circumstances of the case to do so.

Now, there is testimony in the case that the defendants were seen coming from the premises 1109 Savannah St., Southeast by officers approaching in a patrol wagon and that as the patrol wagon approached, the defendants fled from Savannah St., Southeast, down Savannah St., Southeast to their car parked at 11th Place, Southeast, with one officer in pursuit in the patrol wagon and one officer in pursuit on foot.

If you are satisfied that the defendants did run from the scene of the killing, this in itself becomes a factor which you may take into consideration. Flight or running away does not prove guilt since people have been known to run when there is in fact no immediate need or reason to do so but unexplained flight from the scene of a crime upon the approach of police officers is an element which you have the right to consider, if you wish to consider it, in deciding whether in all the circumstances of the case the act of running away may be evidence of a consciousness of wrongdoing.

Before I close and hand the copy of the verdict form to the jury, does either cousel have anything they wish to suggest to me or object to? If so, approach the bench.

[817] Mr. Collins: No, Your Honor.

At the Bench

Mr. Johnson: Of course I object to the posession of recently stolen—Object on the grounds that I Objected to

it before. I don't think that there is evidence this property is stolen.

The Court: You don't think there is any evidence to support the charge of recently stolen property?

Mr. Johnson: No, sir.

The Court: Any other objections?

Mr. Johnson: No, Sir.

The Court: Nothing you want me to clear up?

Mr. Johnson: No, Sir.

Mr. Collins: Nothing.

The Court: Allright

In Open Court:

The Court: Hand thoes [sic] to the Jury. There are two copies of the verdict for each Juror. Copies of these verdicts have previously been given to (counsel) two or three days ago.

(Two copies of form of verdict handed to each Juror)

The Court: Now, you are directed that your verdict must be the considered judgement of each Juror. In order to return a verdict it is necessary that each juror agree thereto—suppose you don't read these verdicts for a moment. I will take them up with you.

[818] Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgement. Each of you must decide the case for yourself but do so only after a consideration of the evidence with your fellow jurors.

In the course of your deliberation do not hesitate to change an opinion when convinced it is erroneous but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of the other jurors or for the mear [sic] purpose of reaching a verdict.

Now, if you will refer to the copies of the special verdict which I have handed to you:

They are the same in all details except one applies to one defendant and one applies to the other defendant.

Now let us take up one of these verdicts: You see that I have first put on page one (1) the second count which I suggest that you consider first Although you may consider them in any order that you wish.

Now the second count charges felony Murder. There Are four possible verdicts that you may reach as to the second count. You can, You see, Reach a verdict of not guilty, of guilty as charged to first degree Murder, of guilty as charged to first degree Murder with recommendation of life imprisonment, or four, guilty as charged of first degree Murder with the jury unable to agree as to the punishment.

[819] Now, You will see certain notes underneath this verdict which tell you what the penilties [sic] are in event you return a certain kind of verdict and I wont go over thoes [sic] with you because I think they are perfectly plain.

Now, Whoever is elected Foreman or Forewoman will actually return His copies as the verdict of the jury signed and dated by him and you must return one for each defendent, one verdict for each defendent on each count.

Now, If you reach in the special verdict as to the second count either verdict 1, 2, 3, or 4, the foreman will not write down simply 1, 2, 3, or 4, says, I hope that is perfectly clear. In other words whichever of thoes [sic] four verdicts you reach, You will not just write a number up there where it says "VERDICT" You will write what your actual verdict is, one of these four.

Now, We can go over to the second page which has to do with the first count and you will note the first thing on that page after the number and the title says:

If the jury has found the defendent guilty—and this is the same as to each defendent—guilty as charged in

the second count, that is either the possible verdict 2, 3, or 4 under the second count, then the jury will return a verdict of not guilty under the first count. You will not have to consider all of the six verdicts; You will simply return a verdict of not guilty if you have found the defendent guilty under count 2.

[820] If, However, the jury has found the defendent not guilty under the second count, they will then consider all possible verdicts under the first count, being any one of numbers one (1) through six (6); and you will note that under the first, which is on the second page, that the first four verdicts are the same as thoes [sic] relating to the second count on page one (1) but there are two additional ones: Guilty of murder in the second degree and guilty of manslaughter.

and then below are further instructions, as I have previously given, about the penilities [sic], so they will be perfectly clear to you.

Now, as to the third count, that is on the third page, that is simply one of two verdicts, either guilty, or not guilty as charged of robbery.

Now, again, let me tell you that the foreman or forewoman, who will return their copies as the verdict, will not write out, for example, on the third count "1". They would put "not guilty"; or they would not write out "2", which would mean guilty as charged. You would write out "guilty as charged" if that be your verdict. In other words, don't just put a number down where it says "Verdict"; Put down what the verdict is.

Now, The members of the jury who are not the foreman or forewoman may make a note on their copies of these so that if you should be polled after your verdict is in by either side, you will have a ready refference [sic] to what your verdict is.

Now, as to my further comments to the jury in explanation of the verdict, does either side have any objections or any suggestions to make?

Mr. Collins: No, Your Honor, The Government is satisfied

Mr. Johnson: No, Your Honor.

The Court: and remember that there is one set of three sheets applying to the defendent Gordon and one set of three sheets applying to the defendent [sic] Frady. They both must be returned by the Jury as to all three counts as to the defendent [sic].

Ladies and Gentlemen, at this time I would like to thank the four alternate jurors for their services in this case. We have sat a little more than a week and we have had no casualties among the jury, from illness or otherwise, which is fine: So we have not needed your service, I know you jurors have served long enough to know why we have alternates and how important they are to us, so I shan't explain it to you again. At this time I will thank you for your services, you may be excused to get anything you have in the jury room and then report to the jury lounge for any instructions they may have for you.

[821] (The four alternate jurors were excused and left the court room)

The Court: You other ladies and gentlemen will have to wait because once being instructed, you can't even be in the jury room with an alternate juror.

Of course you ladies and gentlemen know that when you first get to the jury room you will elect a foreman or forewoman to preside over your deliberations and to return your verdict for you. Also, you know should you wish any exhibit or all the exhibits, your foreman merely has to give a note to the marshal to give to me and any exhibit or exhibits which you want will be sent to you. That is assuming they were admitted in evidence.

(There was a short pause)

The Court: I'm sorry to keep you ladies and gentleman waiting but we must clear the jury room.

(There was a further pause)

The Court: Allright, you may retire and consider your verdict.

(Thereupon at 3:45 P.M., the jury retired to consider their verdict.)

DEFENSE COUNSEL'S CLOSING ARGUMENT

[752] Mr. Johnson: May it please the Cout, ladies and gentlemen of the jury, for some time we have been engaged in determining what fact were on March 13, 1963 with an end en [sic] view of determining whether the defendants had committed the crimes as charge in this indictment.

In that endeavor, the Government has brought several witnesses before you.

I am going to try to give you my point of view, the significant value of those witnesses' testimony and the portions of those witnesses' testimony that I think you will have to make up your mind as jorous [sic] as to whether that represents what actually happened, on March 13, that evening, or whether this is an idea or recollection unrelated to what I consider to be the immutable circumstances of this case, which determine truth or falsity of the testimony.

[753] It is very difficult for me to stand before a group of jurors and say that this witness or that witness is not telling the thruth [sic] because I am not an arbiter of whether a man tells the truth or not. I am only engaged in determining whether the testimony that is adduced bears some reasonable relationship to what my view is as a human being in any given circumstance.

Mr. Collons as the start of his argument, made a statement which is undeniably true. He said that when you see rabbit tracks in the snow you know a rabbit has been there, but when you start out with the fact that you know they are rabbit tracks, the conclusion that a rabbit has been there is mighty easy. The difficulty comes when you don't know whether they are rabbit tracks or not and you have got to prove it.

Now, in that proof is where a tale of March 13 lies but, first, I want to direct your attention to what I conceive

to have been inaccuracies on the testimony and to give you my version and the reasons for it.

[754] Mrs. Carrico, first, to give you an idea of what I mean, testified on one occasion that she looked out of her window and saw a car pass by and the man that she recognized, she recognized as being the same as the defendant Frady. No other testimony placed these boys two times on Savannah Street that evening and at first it alarmed me as to how that possibly could happen, because I thought Mrs. Carrico was telling the truth.

Then it accurred to me there was a very valid reason why Mrs. Carrico made that statement. I remembered then that I had to find out when Mr. Weston came by in the same car, passing in the evening after 4:30 in March, whereas, they don't look identical, they have the same general build and visage.

Now, we do know that Mr. Weston didn't leave his work until 4:30 and that he was on his way out in Southeast into the area where Mrs. Carrico lived, just about that time. I believe Mrs. Carrico, not knowing Frady or Mr. Weston by sight or by acquaintance, seeing the same car brought back there that evening and having a white man looking out of the car possibly was confused as to whether this was Frady because we know that he had only passed there on one occasion so far as the remainder of the testimony is concerned, and that is what I mean by calibeating [sic] the evidance [sic] according to what you would reasonably believe to be true.

[755] So I concluded that Mrs. Carrico was telling, to the best of her ability, first, that she recognized the car. We know that.

Second, that the man looked like this defendant here whom she didn't know, so it was reasonable to persume [sic] that a lady sitting back in her apartment in the evening, looking out at a passing car, that she only saw for a second, but which she recognized the outside of the car, would recognize the car, and since the car was back

there that same evening, would think that this was the same man having no way distinguish between the two, never having seen them both but having seen the car twice on the same evening.

So I concluded that Mrs. Carrico's testimony was consistent with good sense and stood that test and had the ring of sincerity that I look for in the testimony of the various witness.

Now, then I came to examine the next witness of any provacative [sic] interest, Officer Hardy, and I had to examine his testimony carefully. He is an officer, he evidently has no interest particularly in this case, and I had to examine him as I would examine an ordinary human being.

First I concluded that he had been trained in police work or else he wouldn't be wearing a uniform, that he had been to a police school, that he had been trained in observation and not only that, that he had experience in testifying Court.

[756] The third thing that I thought about him, that I thought I could not deny, was this was a very serious case as my friend said. This is a first degree murder case. He knew that his testimony was vital to these defendants, that his stightest [sic] word a juror would cedit [sic] under normal circumstances, and that they would give meaning to everything he said. So then I Started examaining [sic] him in the idea of finding out whether despite his—even his attempt not to do so—he would attempt to color his testimony consistant [sic] with the conclusion that he had come to, not whether he is going to tell a lie or not but whether he is going to tend to color his testimony because he's come to a conclusion on the night.

So the first thing that I discovered about Officer Hardy's testimony was that he was inaccurate. Number one, I had to examine it in the light of what a policeman would normally do first and I tested it along that line by examining in this fashion, if you will recall: I said, "Officer Hardy, was it dark that night?" He said, "Yes."

I said, "Now, were there bushes around about?" He said, "Yes"

[757] And there were pictures at this place taken so that I could fine out, since he was coming down Savannah St. from Tweefth [sic] St. on the opposite side of the street from 1109, just approximately how far he had come down before he could see. I got to the place where he saw the boys. He said he saw these boys and he was almost directly in front of 1109, so I knew one thing was true: That he was in the proper position to see the boys. He said they came running down the steps and when they got down in the middle of the steps they said, "Here are the cops," so I knew two things were true from his point of view. That not only he but the boys could see him unaided by the bushes to the side so they weren't looking to the left to see the police and the police weren't coming from the right—I mean they were coming from the right and not from the left, so he had to be almost directly in front of them to see it.

Now, having that in mind that he says he's almost directly in front of it and there are two police officers in that car, and the address is the address that he is responding too a call about, he says he sees these boys running down the steps, not away from him toward him. He remains in the car. The boys come out onto the front porch, turn and go down Eleventh St., and he starts up his car to follow them.

[758] Now, it occured to me that I had to examine that for the purpose of determining whether, in the normal course of police endeavors, a policeman responding to a call of a man screaming would see two boys running directly from the place toward him, would stay in his car, wouldn't drive over toward them to try to cut them off, but would remain in his car and start his car after them, that he would not as much as give notice that he would not as much as give notice that he had any interest in them, although he knew from his testimony that they knew that they had seen him.

Then the next thing I examined about it was this. He said he went around the corner, he last [sic] sight of the boys. Evidently leaving the impression that these boys were fleeing from a scene of a crime and in hot pursuit, he went down to that corner and he turned to the left after they get out of sight and he said then his searchlight got on Frady.

Now, he testified to a peculiar thing. In Government's Exhibit 6A. he testified that these boys cut across this lawn right by those bushes, when he lost sight of them, out into the street and then his light caught up with Gordon and then while the light was on him, that he then stood down behind the car in which he was going to get, knowing the police were immediately behind him, and put a pocketbook or putting something that he couldn't see—in his direct testimony he says he put it under the automobile, and then went around in back of his automobile out of sight and got in the righthand side of the car.

[759] Now, I thought about that for a minute. I thought that was unusual. The next thing I thought about his testimony is this: Well, what did he do then, I said, well, he didn't know what the boys had actually done at that time, he just saw them running. He would probably just make inquiries of them and perhaps that may have been why he didn't do anything about it, although that was hard for me to conceive of, but crediting him with that indescretion [sic] of a police official, I then said, well, now, he's going to search the boys and find out something to hold them with. He searches them.

Now, here's the peculiar part. It became critical to me that Officer Clark then came up to where they were sitting and said that man on 1109 was shot in the head. Now, that testimony occured, and Officer Wesley testified about it, and I asked Officer Hardy, did he remember the conversation, and he said he was talking to my partner and I didn't pay any attention to him. That testimony is to be found in the record—

Mr. Collins: Your Honor, I object to him referring to the record. I think he ought to recall the record, the testimony.

[760] The Court: He may read parts of the testimony, if he wants to, and so can you.

What are you reading from, what volume and what page?

Mr. Johnson: I think that is Volume 3, if Your Honor please.

The Court: Volume three page what?

Mr. Johnson: Page 228, in which this is what his testimony was:

Question. And what was the officer's name that came up to you out there?

Answer. Private Ronald A. Clark.

Question. And during the period he was there, when you had the conversation about the man being shot—you had a conversation about the man being shot?

Answer. He didn't talk to me directly, he was talking to my partner.

So I know at that time, while the boys were on Eleventh Place that he knew that a man had been shot in 1109, or thought that he had been shot, in any event, because the police officer had reported it to him.

Then I said, why certain it is, having just immediately before then seen this boy stoop down and put it under the car in vack [sic] of him, that he would then immediately go there, take his searchlight, and pick it up, so that he could confront him with it. But he did not, it did not happen in that fashion. He said that he stayed there until some other officers came up and then he stayed with them about five or ten minutes more and then he went around on Savannah St., that after he had been around there awhile, he suddenly remembered that this boy had put something under the automobile, and he went back there later on and found it.

[761] Now, when he testified before you ladies and gentlemen of the jury, the first discrepancy occurred—

I didn't believe at that time that that was an accurate portrayal of what happened, but I said, let's test it a minute. I know that he had given sworn testimony at the Coroner's inquiry shortly after this affair occurred. He's testified for you ladies and gentlemen that he also found under that car a pair of gloves.

So then I said to him, I said, "Now Officer Hardy, didn't you testify at the jail that the gloves weren't under the car?" and then I read his testimony at the Coroner's inquest to him and read his testimony here and I said, "Which of these two versions of the sworn testimony is true?" He said, "The one at the Coroner's inquest."

Then it occurred to me that the thing that occurred to him was not that he was attempting, perhaps, to tell a story, but that he was coloring his evidence in his belief that these boys were guilty, and it led him to tell an untruth to this jury.

[762] When I next examined him I wanted to know how long it was before he went back around there, and he told me it was five or ten minutes. His examination a little later on showed that he—he was around there fifteen or twenty minutes and then he went around on Savannah St. and went into the house.

At that time he did not say that he had talked to Mrs. Ryder when she was brought around on Savannah St. after having left the paddy wagon which he later said that he had talked to her in the paddy wagon without getting into it. So I know that it was a substantial period of time later, more than a half hour, when this pocketbook was allegedly discovered.

With that in mind, I had to evaluate exactly that testimony against the testimony of Mrs. Ryder because then I had to find out whether Mrs. Ryder's recount of the thing was true.

She said that, number one, the boys left the car and stayed about five minutes. She, in addition to that, said that she saw the boys walking around the corner

and that after they got in the car she heard the wagon make a noise and looked over her shoulder and saw it pass from her view, then come back into her view up to where they were.

[763] During the course of that I asked her, did anything unusual happen in the meantime before the paddy wagon came by. She says, "Yes, a dark car passed me and went down to the corner and turned to the right". I had a purpose in asking her that.

Then I had to evaluate again—and these are not my witnesses, these are Government witnesses—I had to evaluate the story as to whether the boys were walking around and the paddy wagon came around after they got into the car and this business about stooping down and putting the object under the car was true, there are two different divergent and dimetrically opposed statements in the Government's case as to what happened at that time.

I know one thing, however, I know it would be advantageous to place it the way that Officer Hardy placed it. I know that he is inclined to do that because I can demonstrate that he did it once with reference to the gloves. I can demonstrate that in the record.

Then I started worrying about every single item that occurred and to my eternal surprise, irrefutable evidence that another thing had occurred: I don't suppose you ladies and gentlemen of the jury will ever forget the testimony of the sargeant [sic] who had retired, Sargeant Schevab, who came here and told you, with a background of 27 years, that this was the murder weapon. His honor remonstrated with me because I didn't object immediately. I did but later I affirmatively asked him the question and there was a reason why I asked him. I didn't understand how it was that that weapon could have been used and I will tell you why.

[764] However, before I tell you that, something else occurred. He told you ladies and gentlemen of the jury

that on March 18 that he had taken that piece of evidence down to the District Morgue, placed it on the head of the deceased man to measure whether that had been used to commit the offense.

Now, ladies and gentlemen, that struck me a little peculiar and I will tell you why. I have no way of disputing that, number one. Number two, it would seem to me that in murder, that this occurred, if at all, on March 13th, and I was wondering why it was not until March 18th that some deposition had been made of this particular murder weapon as to determine whether it was or not.

I was horrified, however, when the man from the Federal Bureau of Investigation got on the stand. He testified—and, now, if you remember correctly, he was a bright, intelligent, forthright, honest member of the Federal Bureau of Investigation, and he appeared that way as a witness and immediately when he got on the stand and gave his qualifications, I said, — I conceded the qualifications that he had.

[765] When he testified in this courtroom that that alleged murder weapon had been in his exclusive custody from March 15th to June 7th, I was astaunded [sic]. I was astounded. I said, how could Sergeant Schevab take it down to the morgue on the 18th if this man from the F.B.I. had it from March 15th until June 7th; and then his Honor question about it and he elecited [sic], do you have your notes here, and he says, yes. He says, "As a matter of fact, my notes show I was exactly working on it on the 17th and the 18th. I was working on it myself, and it never got out of my custody."

Why, then, I commenced wondering, why this discrepancy. This—it doesn't mean anything. He could have said he took it there on the 14th or the 13th, but I wonder why he testified that way and I am going to tell you what happened, and this is a disastrous type of thing in a murder case, a desastrous [sic] sort of thing.

Before they sent that thing down to the Federal Bureau of Investigation to test it for blood of this decedent and to test it for a hair that they said they had on it, this police official must have taken it down to the Morgue and stuck it in the wound. There is no other conclusion that you can come to. They made a patsy out that man on the stand. They brought him in here and if you ladies and gentlemen remember that I said, was that piece of hair on the side or was it on the bottom, and they said, no, it was on the side. I said, "Did it look like it was just laying on there?" He says, Yes.

[766] Well, now, why would you do that? Why? I don't have a chance, if those are just—it just happens that the Federal Bureau of Investigation keeps records. It just happens.

Now, can I then say with confidence that I believe that type of testimony? How can I say it? Isn't it ridiculous to do that to someone? Is there any safety in this type of thing? Is it necessary to bludgeon these boys down like that? Why would you do that? It just seems inexcusable.

Now, everything else, I worry about. What am I going to have these boys, deny it? What can you do? What can you do? What relief have you got? Is there any possible thing you can do to combat it? But here is a demonstration, this one little thing, just one little thing, one hair and not to tell the Federal Bureau of Investigation that they did that and come and tell you that they sent it to the Federal Bureau of Investigation on the 15th for examination and they did that afterwards on the 18th is ridiculous and inexcusable.

[767] Now, it would be a matter, a different matter, I imagine, if it were a game of tiddlywinks, but two boys' lives depend on this, two boys lifes [sic] depend on this and I think it is absolutely inforgivable for anybody in an official capacity to do a thing like that.

The only other conclusion you can come to is that the man with the Federal Bureau of Investigation is an

unmitigated liar. That is the only way you conclude that that happened.

Now, that caused me some concern about the pocketbook because that gave me some concern. However, let's proceed a little further and let's, aside from intuperation [sic] and—pardon my excess in that regard—let's examine this from a point of view from just a common sense point of view. This indictment charges that on March 13 these boys were with premeditation and malice aforethought went up to that place to kill this man with their fists and a piece of wood. They absolutely premeditated going there to do that. That is the first thing.

Now, let's assume, again, let's examine that and see whether that fits.

[768] Now, there could be two circumstances. There is no proof that they knew Thomas Bennett, no proof of that, so we don't have that to work on, but there are two conclusions we can come to. They either didn't know him or they did know him. There are only two ways to look at it, and I don't think there is any error in looking at it in both ways.

Now let's proceed on the theory that they didn't know him. Would you suppose that two men would, with premeditated and with malice aforethought, go up to a stranger's house, barehanded, knock on the door, to murder him and what kind of man? Well, we don't know what he is but that doesn't quite cotton the man. If they were going, up there and had said we are going, make up our mind we are going to murder this man in this house, there's not been one suggestion that they even knew his name.

However, let's examine it a little further. Let's take the other end of the thing that they did knew [sic] him, it isn't any better on the end. Would two boys there go up there to murder a man barehanded who was six feet tall, weighed 195 pounds and was well developed physically and if they did so, would they go then and politely knock on the door for him to come so they could start

the murder? In other words, that is what Mr. Collins just finished saying, then went in and then they maneuvered around this man to stalk him and to kill him with their barehands, and and [sic] what does he say they killed him with? Their bare hands and a piece of wood. That was from a table, that was already in there. So we must presume, then, that the boys are going there, according to the first count, and murder this man with a piece of wood that they are going to find in the house, that we don't know that they have ever been in there before.

[769] Now, it seems to me that something else must have happened but that. Now, let's examine the second count in that area. It's a matter of common sense, did they go up there to rob him? Well, I don't know how robberies accur [sic]. I don't suppose there is any limit as to the way it can be accomplished, but one of the least recommended ways would be to go up there bare handed to rob a man either that you didn't know who he was, or if you knew who he was, you knew he was a great big man, and knock on his door and then proceed to rob him. It seems to me that—of course, unless there is some compelling reason to make them do this, it would be highly improbable that they would do that.

Now, let's examine it a little further from the point of view of common sense and the way people ordinarily think, and the way I think this evidence shows.

Frady, under the evidence, according to the evidence, didn't know Mrs. Ryder prior to the night. He didn't know who she was. Now, do you suppose, then, he would premeditate, commit murder and commit a robbery with a brand new young lady that he didn't know in the car waiting for him? I don't understand. Maybe they are totally ignorant, with no sense whatsoever, but I suppose they know left from right. I don't suppose anybody in the world ever committed a robbery and a murder in this fashion in my life.

[770] Now, that made me suspicious of this thing and they've got me down to one further fact. That fact, I

think, is absolutely immutable. I don't suppose Mrs. Hunt would tell a lie on the stand for love or money for me or anybody else. I don't suppose she would. Mrs. Hunt says—and the police say that she called the police—when she heard this man screaming. I know that happened. The police records show that she called exactly at 8:44, Mr. Collin's developed the fact. I didn't develop it. He asked how long before she called was it that the knock occurred. She said about ten minutes.

Then he went—he didn't stop, he said, Well now, what happened after the call. She says nothing happened for a couple of minutes. "Then I heard some rumbling in there. Then there came a thumping like something—somebody was fighting and being knocked all around and finally started screaming and then I decided to call the police."

[771] So we know, or as nearly as we can tell, and as honest as I think that lady is, that they—persons came up on that step at approximately 8:34, approximately, give or take a couple of minutes. They had to. Then the fight went on for ten minutes until the screaming started, after which she called, which is 8:44.

Now, those are the police records because I have introduced no evidence about that. They testify that is what happened, and Mrs. Hunt, testified for the Government that that was the time element.

Then I have to go back to Basson's restaurant and young Ryder got on the stand and testified that he called his wife or his wife called him at 8:05, and I didn't ask him why he would remember that time, but I thought you, as ladies and gentlemen of the Jury, would know how he'd remember that time. I think he was concerned because his wife wasn't home, and I think their conversation was "Why aren't you home and where are you." He's a young man, married to a young woman, and I think that is what the conversation was about, I am almost positive of it. So I think that she told him, just like

she said that "I'll be home in about three-quarters of an hour."

Then I started to thinking about Mrs. Ryder's testimony. Her husband is evidently concerned about her being where she is, starts to become time conscious," when am I going to get home" so then I asked her approximately what time did she leave, and she said "I think it was about 8:32."

[772] Now, I said maybe that's a guess and maybe a helpful thing for me but then, lo, and behold! the Government produced the waitress from the place and she said, she gave an estimate, the best she could, between 8:30 and 9:00, and I looked at the clock at 8:30 and they were gone.

Now, let's examine that. Let's don't swallow it like a pill. Let's examine it under the way we would examine time as a matter of common sense. Let's add eight minutes to the 8:05. That's 8:10. There's no question but that Gordon must have eaten a chicken dinner in there. If it wasn't, the United States Attorney's office would have known about it because time is becoming awful important in this thing. He says, "I ate my chicken dinner, and then this conversation that he brought out took place, Frady getting up from the table. Gordon getting up from the table, and I imagine that I can give the man eight minutes to eat a chicken dinner, just eight minutes if it's already ready right there, eight minutes, that 8:18. Suppose they didn't talk but two minutes and drank their beer in two minutes more. That's 8:20. They couldn't have gotten to 1109 Savannah St. until the screaming started. Now, that is where the crux of this case is.

[773] Now, those are not my time elements. These are the Government's time elements. They produced these witnesses. I didn't produce them.

Now let's examine it a little further, see whether that is consistent with things. Suppose these boys went there and they heard the man screaming. They more than likely could. Would they run away? Would they walk down the

street and get out of the way? I think they would. I am not saying—don't get the idea that I am saying it happened one way or the other—I just want you to eximine [sic] it from a common sense point of view.

Now, what do you think happened in their mind when a policeman came up there and said the man around the corner is shot in the head? What do you think happened to their minds at that time? Now, I want to tell you this. I would have never been able to have proved that by a single, solitory [sic] witness except these defendants or somebody else closely connected with them. Nobody that I know of would have witnessed it. They know nobody but the Government produced these witnesses and I think that when you look for consistencies—His Honor is going to instruct you along those lines—about what you are to look for, how much proof you have to have, whether you can rationalize the conduct in this case without convicating [sic] these boys, and it's precisely just about that, and that is what your duty is, if you can do it. In other word, that is consistant [sic], that there is consistency with anything, it is going to be your duty to acquit him. Mind you, my friend—I don't have to depend on Atkins. I don't know him. They don't know him. He is a man that called up and gave some information. However, his testimony, let's see, again, is corroborated.

[774] Number one, if the time element is correct that the Government produced, then the beating started before the boys got there, then somebody beat him, somebody beat him. Now, the testimony is by that man that immediately after he saw the boys walking down the street, he saw this man come out, come across the street, get in his car and go away after the paddy wagon went around the corner. Now, that is his testimony.

Now, it would be—maybe you might be inclined to disbelieve, don't pay any attention to his testimony, but let's see if the opportunity existed by unimpeachable evidence for that to have occurred. I don't think Mr. Carrico is

going to lie, either, but when Mr. Carrico got on that stand and told me that he left that area about 8:30, that he went to get some gasoline and groceries and he came back to that area, when the K-9 dog man came in and at that time there were no other police officers in the thing, then I knew that after the paddy wagon went around the corner there was an interim when there was nobody to watch that man but Atkins. I knew it then. I don't think that could have been trumped up with Corrico [sic]. I don't think that. I think when I showed that this man's testimony is not palpably untrue and it is consistent with the time element, absolutely consistent with the time element, absolutely consistant [sic] with the movements of the parties as we know them and all of it from Government testimony, I don't think that you can say—I don't think that you can say "I just don't believe that," because it follows the rule of consistency with the known factors that are immutable and you can't change.

[775] In addition to that, I might tell you this: In this case, as in every other case, your duty is to find the facts impartially without favor and it is your duy to find them according to a way which makes the evidence consistent if it can be made with these boys innocence not with their guilt. If there is a way for you to lok [sic] at this evedence that is consistent with their innocence, it is your duty to follow that and His Honor will tell you that.

The Court: No, I will not. I denied that instruction, Mr. Johnson.

Mr. Johnson: Yes, sir.

It is my understanding, their, that it is your duty to find, if you can find in this evidence as you know it to be, that is consistent with their innocence, and I think if you find it that way you have a duty as a juror to follow it that way. I don't think—and you are the final arbiters of the facts. Not anyone else on earth can tell you what the facts are. No one, me, Mr. Collins, or His Honor, none of us can tell you what the facts are. You are in a superior position to anyone else in the world

about the facts in this case. You don't have to believe what I say about them. You don't have to believe what Mr. Collins says, His Honor, or anyone. You have actual, free, clear facts to find that the evidence, as you in your conscience can find it, as it is in this case, and only on the evidence, only on the evidence adduced.

[776] The Court: Mr. Johnson, you have used 45 minutes.

Mr. Johnson: Yes, sir, very well, sir.

The Court: You have fifteen more.

Mr. Johnson: Yes, sir.

Now, with regard to one other factor, and I will have done.

There is one single witness in this case that hasn't been produced by the Government. That is the K-9 dog man. There was a witness here who, the last witness on, attempted to dispute the fact that there was an opportunity for that man to come out of that house and get in that car and go away. Perhaps the only other man that I know of could have given any testimony was the K-9 dog man, and he is not here and he hasn't testified. That is the only man in the world that I know of that could have done so, and he wasn't produced.

[777] Now, finally, may I say this to you: I don't believe that it is reasonable to assume that these boys, with no weapons, one of them with a strange girl he had never seen before, went to 1109 Savannah St. with premeditation and malice aforethought to kill Thomas Bennett, nor do I believe that they ever intended to rob him; and, finally, and in that connection, it is your duty as jurors to take those facts that I have just indicated to you and your experience as men and women in this community and determine, because you have to find, you have to find that they intended to kill him with some instrument or something at some time or the other. You have to find that in order to convict them under the second count that they went there for the purpose of robbing him and killed

him incidentally to a robbery. You have to find those facts which are hard to find under the circumstances in this case.

I say to you that your duty is the highest duty that an American Citizen can perform. I hope and trust that you perform it with the integrity I know you will, and I know and I trust and hope that when you rationalize this thing without being influenced one way or the other by passion, prejudice or anything else and view this evidence in the light of common sense and in the light of the facts that this evidence comes from the Government, and he vouches for it, that these boys are not guilty of the offenses with which they are charged.

SUPREME COURT OF THE UNITED STATES

No. 80-1595

UNITED STATES, PETITIONER

v.

JOSEPH C. FRADY

ORDER ALLOWING CERTIORARI

Filed June 29, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The Chief Justice and Justice Marshall took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 351966 504